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No. 1045

In the

Supreme Court of the United States

October Term 1962

MILLARD VANCE, ET AL.,

Petitioners,

vs.

MIDLAND ENTERPRISES, INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals, First Appellate Judicial District of Ohio (Hamilton County)

BRIEF FOR RESPONDENTS IN OPPOSITION

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No. 1015

In the

Supreme Court of the United States

October Term 1962

MILLARD VANCE, THOMAS H. CHILDERS, F. M. COOK, VAUGHN BORDERS, ARNOLD PHILLIPS, ROCCO CAPNA, E. W. KITCHEN, LESLIE J. EVANS, JOHN KIRALY, LUTHER BARNETT, HOMER HARDIN, HELEN W. COOK, EZRA BISHOP, ARTHUR MARTIN, EUGENE COOK, IRELAND L. BOWLING, JOHNNY MARTIN, H. J. BARNHART, HARLAN ELLINGTON, HARRY W. HATFIELD, JACK SHANNON, PALMER GARVER, NATHAN TABOR,

OSCAR SIZEMORE, KYLE H. TAYLOR, FLOYD VARNEY, SHEBY FARMER, IRA JAMES CYFERS,

Petitioners,

vs.

MIDLAND ENTERPRISES, INC., a Delaware Corporation,

The following persons as TRUSTEES of the RETIREMENT FUND of THE OHIO RIVER COMPANY, and individually, ELI GOLDSTON, LOUIS R. FIORE*, MORRIS CREDITOR, and A. H. CRANE;

The following persons as the COMMITTEE for the RETIREMENT FUND of THE OHIO RIVER COMPANY, and individually, ELI GOLDSTON, LOUIS R. FIORE*, MORRIS CREDITOR, A. H. CRANE, J. L. DEAN, and B. R. BENTER,

Respondents.

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*Louis R. Fiore was substituted for Nicholas H. Carlozzi as a party defendant by order of the Court of Appeals, Hamilton County, Ohio, entered March 3, 1962.

On Petition For Writ Of Certiorari To The Court Of Appeals, First Appellate Judicial District of Ohio (Hamilton County)

BRIEF FOR RESPONDENTS IN OPPOSITION

I. THE OPINIONS OF THE COURT BELOW

Counsel for Petitioners are mistaken in saying that the Court of Appeals for the First Appellate Judicial District of Ohio (Hamilton County) did not write an opinion. The Court's opinion, handed down on July 2, 1962, reads as follows:

> "BY THE COURT.
>
> "A decree similar to the decree entered in the Court of Common Pleas will be entered in this Court, based upon the authority of Judge Renner's opinion."

All the Judges of the Court of Appeals concurred, thus in effect adopting the opinions of Judge Renner reproduced on pages 20 to 29, inclusive, of the Appendix to the Petition herein.

II. JURISDICTION

This Court does not have jurisdiction of this case as provided in Judicial Code 28 U.S.C., Section 1257(3), inasmuch as the validity of a treaty or statute of the United States or of a state statute is not drawn in question and no title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes

of, or commission held or authority exercised under, the United States.

III. STATEMENT OF THE CASE

Counsel for Petitioners state at page 6 of their Petition. "There is no dispute whatsoever, and the facts and Findings* of Fact by the Court of Appeals, attached hereto, are accepted." With this we agree. We have no exception to the statement of facts made by Petitioners insofar as it does not conflict with the Court's Conclusions of Fact and Conclusions of Law as printed in the Appendix to the Petition, pages 29 to 36, inclusive. The important point to be noted is that in no part of the Conclusions of Fact and Conclusions of Law is there any reference to the provisions of the Internal Revenue Code, on which counsel for Petitioners rely.

IV. ARGUMENT

A. The Interpretation of the Retirement Plan is a Matter of State Law.

This case involves the interpretation under the laws of the State of Ohio of the contract set forth in a Retirement Plan (hereinafter sometimes referred to as the "Plan") of West Virginia Coal & Coke Corporation (hereinafter referred to as "West Virginia") and Subsidiaries, actually put into effect on April 30, 1949, but retroactive to January 1, 1949, as amended from time to time to and including December 12, 1954, at or about which time Petitioners ceased to be employees of West Virginia or any of its subsidiaries. West Virginia was the predecessor in interest of Respondent, Midland Enterprises, Inc., and was the

*Under the rules of the Court of Appeals of Ohio these are called "Conclusions", not "Findings".

employer of Petitioners until their separation from service in December, 1954. The Ohio River Company was a subsidiary of West Virginia whose qualified employees were and are covered by the Plan. The first Petition was filed in the Common Pleas Court of Hamilton County, Ohio, on April 7, 1961.

No right arising under any federal statute was or is involved.

As shown from the Conclusions of Fact and Conclusions of Law of the Court of Appeals in the instant case (Appendix to Petition herein, pages 29 to 36, inclusive), the decision was made on the basis entirely of state law, without reference to the provisions of the Internal Revenue Code. Under such circumstances there is no federal jurisdiction. *Durley* v. *Mayo*, 351 U.S. 277, at page 281 (1956); *Stembridge* v. *Georgia*, 343 U.S. 541, at page 547 (1952), and cases there cited; *Lynch* v. *New York*, 293 U.S. 52, at page 54 (1934), and *Allen* v. *Arguimbau*, 198 U.S. 149, at pages 154 and 155 (1905).

The decisions of the Common Pleas Court, the Court of Appeals and the Supreme Court of Ohio in the instant case have nothing to do with Section 165 (A) of the 1939 Internal Revenue Code and Section 401 of the 1954 Internal Revenue Code, which merely state the requirements for qualification of pension, profit sharing and stock bonus plans. These decisions turned simply on the interpretation of the terms of the contract made in the offer of the Retirement Plan to the employees of West Virginia and its subsidiaries who were not covered by any collective bargaining agreement or employed in a job classification covered by a collective bargaining agreement.

Petitioners are not entitled to any claim against the Respondents under the above cited provisions of the Internal Revenue Code. See on this point *Allen* v. *Arguimbau*, 198 U.S. 149, cited *supra*. Compare *Wilder Manufac-*

turing Co. v. *Corn Products Co.*, 236 U.S. 165 (1915) at pages 174 and 175; and *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373 (1958) at pages 377 to 379, inclusive.

If West Virginia had violated the terms of the statutes, which it did not do, it could have suffered certain adverse tax consequences. That result, however, *vis a vis* the Internal Revenue Code would have no bearing on the continuation of the fund itself nor upon the rights of the Petitioners, if any, with respect to that fund. Any substantive rights of the Participants under the Plan would still be solely a matter for determination under applicable Ohio law.

The most that counsel for Petitioners claim is that the provisions of the Internal Revenue Code may be involved in the interpretation of the contract contained in the Retirement Plan. Even if this were so it would not constitute a claim under the statutes of the United States. See *Gully* v. *First National Bank*, 299 U.S. 109 (1936), at pages 111 and 115. The *Gully* case is cited most recently by this Court in *International Association of Machinists* v. *Central Airlines, Inc.*, — U.S. —, 83 S.C.R. 956, at page 964, decided April 15, 1963.

The Conclusions of Fact and Conclusions of Law of the Court of Appeals printed in the Appendix to the Petition herein, pages 29 to 36, inclusive, made the Retirement Plan adopted by West Virginia, effective January 1, 1949, with all amendments thereto to December 12, 1954, a part of said Conclusions of Fact as Exhibit A (paragraph 7, page 32). Said Plan, however, was not printed by Petitioners in the Appendix.

The Plan provided for alternate retirement dates (Articles VI and VIII). None of the Petitioners had reached either retirement date when they ceased to be employees of the Company. (Conclusions of Fact 17, Appendix to Petition, page 34).

Article XII provides:

> "A Participant whose service is terminated for any reason other than retirement, shall lose all rights and benefits under the Plan."

So that there could be no misunderstanding on the part of eligible employees, a copy of the Plan was given to each of them when first adopted, and as new eligible employees were employed by West Virginia thereafter each of them was given a copy of the Plan with all up-to-date amendments thereto. Said copies contained the "Outline of Principal Provisions", printed in the front of the Plan (Conclusions of Fact, paragraph 7, page 32 of Appendix to Petition). This Outline, at page 5, paragraph 9, under the heading **"Termination of Service"** contained the following plain statement:

> "A Participating Employee whose services are terminated for any reason other than retirement shall lose all rights and benefits under the Plan."

The entire cost of the Plan was borne by the Company and the employees made no contributions to it. (Article XVII of the Plan; Conclusions of Fact, paragraph 9, Appendix to Petition, page 32.)

Article XX, Section 2 of which is quoted only in part on page 9 of the Petition, provides in Section 1 that the Company reserves the right, by action of the Board of Directors, to terminate its contributions and to modify or amend the Plan by delivering to the Trustee a certified copy of the resolutions of the Board of Directors specifying such termination, modifications or amendments.

Paragraph 18 of the Conclusions of Fact (Appendix to Petition, page 34) reads as follows:

> "At no time has the Board of Directors of West Virginia or its successors taken any action to termi-

nate the contributions of any of said companies to the Trust Fund. At no time has a copy of any resolution of the Board of Directors of West Virginia or of any of its successors terminating contributions to the Trust Fund been adopted or delivered to any Trustee or successor Trustee under the Trust Agreement."

The Plan has continued in effect (paragraph 16 of Conclusions of Fact and paragraph 6 of Conclusions of Law, pages 34 and 35 of Appendix to Petition; see also Opinion, page 28).

Section 2 of Article XXII of the Plan reads as follows:

> "*Governing Law.* This Plan shall be construed and its validity determined in accordance with the Laws of the State of Ohio."

Conclusions of Law 7 of the Court of Appeals (Appendix to Petition, page 35) reads as follows:

> "With respect to a plan containing the terms of Exhibit A hereto attached, the law is that unless employees in the position of plaintiffs have reached the retirement age at the time of the termination of their employment they cease to have any interest in the Trust Funds, where the Plan continues in effect after the termination of their employment."

This is consistent with the decision of the Supreme Court of Ohio in *Canton* v. *Berkshire Life Insurance Company*, 171 O.S. 405, 171 N.E.2d 518 (1960) and followed the decision of the Judges of the Court of Appeals for the first Appellate District sitting by designation in Summit County in *Wallace* v. *Northern Ohio Traction & Light Co.*, 57 O.App. 203 (1937), motion to certify the record overruled, December 1, 1937 (57 O.App. xxxvi).

It is also consistent with the decisions of the courts in *Katz* v. *Luther Manufacturing Co.*, 338 Mass. 313, 155

N.E. 2d 441 (1959); *Gorr* v. *Consolidated Foods Corporation*, 253 Minn. 375, 91 N.W. 2d 772 (1958), *George* v. *Haber*, 343 Mich. 218, 72 N.W. 2d 121 (1955), *Finnell* v. *Cramet, Inc.*, 289 F. 2d 409 (6 Cir. 1961), and *Local Lodge 2040, etc.* v. *Servel Inc.*, 268 F. 2d 692 (7 Cir. 1959), *certiorari* denied 361 U.S. 884.

II. No Claim of Federal Right was Timely or Properly Made by Petitioners.

No claim was made in the Petition filed April 7, 1961 in the *Vance* case as to any loss of rights under any federal statute. The only allegation as to taxes was in the paragraph which read:

> "The West Virginia Coal and Coke Corporation and its successors, the defendants herein named, received substantial decreases in Federal Income Taxes by reason of the establishment of said Trust Fund."

The same allegation was contained in the Amended Petition filed on July 19, 1961.

The Petition in the *Sizemore* case, filed July 6, 1961, contains a reference to the tax situation in slightly different language. It says that the interpretation placed by the Respondents on the Plan is

> "in conflict with the representations made by the West Virginia Coal and Coke Corporation at the time said Plan was inaugurated to the U.S. Treasury Department, Internal Revenue Service that it was impossible 'at any time prior to the satisfaction of all liabilitied (sic) with respect to employees and their beneficiaries under the trust for any part of the corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of its employees or their beneficiaries.'"

No part of the corpus or income has been used for or diverted to other purposes.

C. Counsel for Petitioners Abandoned Reliance on West Virginia's Alleged Violation of the Internal Revenue Code Provisions by Objection to Evidence Offered in Connection Therewith at the Trial.

Upon a disclosure of the facts relating to the discharge of Petitioners and others on or about December 12, 1954 to the Internal Revenue Service, West Virginia's tax returns and tax liabilities for the years 1952, 1953 and 1954 (involving contributions to the Retirement Fund and substantial refunds claimed for the years 1952 and 1953) resulted in approval by the Internal Revenue Service as well as by the Joint Congressional Committee on Internal Revenue Taxation (as required by Sections 6103 of the Internal Revenue Code of 1954) of West Virginia's determination of its tax liabilities for the years in question. When the Respondents tried to prove these matters at the trial counsel for Petitioners objected and agreed that it was not material. The entire colloquy and proffer on this subject between the Court and counsel for Petitioners and Respondents appear on pages 17 to 20, inclusive, of the typewritten transcript of the hearing in the Common Pleas Court of Hamilton County, Ohio, on July 17 and 18, 1961. This transcript was made part of the record in the Court of Appeals.

V. CONCLUSION

The validity of no treaty or statute of the United States or of a state statute has been drawn in question or been alleged in any of the proceedings in the instant case or in the Petition for a Writ of Certiorari.

No title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The Petitioners did not obtain any rights under the terms of the Revenue Act. If they had, these matters were not timely pleaded or specially set up by counsel for Petitioners. At any rate any Federal claim based on the Internal Revenue Code was waived by counsel for Petitioners during the course of the trial.

No Federal question was necessary to be considered nor was any such question considered in the decisions of the Courts below. These decisions were solely on the interpretation of the contract embodied in the Retirement Plan under the Ohio law.

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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